No. 22422

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARY F. CUNNINGHAM,

Appellant,

vs.

LITTON INDUSTRIES,

Appellee.

Brief of Western Airlines, Incorporated, as Amicus Curiae on Behalf of Defendant Litton Industries.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Rules

Statutes

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Interest of Amicus Curiae Western Airlines Incorporated.

There is pending in the United States District Court for the Central District of California a case entitled Enrique B. Lopez, Plaintiff v. Western Airlines Incorporated, Defendant, said case being No. 67-1697-TC. That case, like the instant one, involves questions concerning the time limitations for bringing suit under Section 706 of Title VII of the Civil Rights Act of 1964. (*42 U.S.C. 2000 e-5.*) The position of Western Airlines Incoporated is roughly the same as the position of Appellee Litton Industries in this case, and for that reason a motion was duly made on April 26, 1968, by Western Airlines Incorported to intervene amicus curiae on behalf of defendant and Appellee Litton Industries. The motion was granted on April 30, 1968, and was filed by the Clerk on May 1, 1968.

Statement.

From the briefs previously filed by the parties to this action, as well as *amici curiae,* it is clear that no significant dispute exists as to the facts of this case. Plaintiff[1] Mary Cunningham was first employed by defendant Litton Industries in October of 1961.

In May of 1965, an opening occurred for a position entitled "Publications Quality Control Coordinator", but the plaintiff was not given the position, allegedly because she was of the female sex, and for no other reason. The May, 1965, date has no bearing on the action, as it is manifestly clear under the Civil Rights Act of 1964, hereinafter referred to as the "Act," that any claim based on alleged discrimination occurring in May of 1965 would be barred by the Statutes of Limitations, regardless of how the same might be construed.

Sometime in April of 1966, defendant Litton Industries created a new position which was also entitled "Publications Quality Control Coordinator". Although plaintiff desired this posititon, she was not given the position. The job was eventually filled by one Muscarella, who, according to plaintiff, did not have the same high degree of skill and experience which plaintiff enjoyed. Plaintiff allegedly did not receive the position solely because she was of the female sex. At that time the plaintiff complained to her employer and Muscarella was apparently given some special on-the-job training for the position. [Clk. Tr. p. 5, par. VI.] Thereafter, in July of 1966, Muscarella was reappointed the newly

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[1]For consistency and convenience of reference in this brief, we refer to the parties by their designations in the Court below, namely, Mary F. Cunningham as plaintiff, and Litton Industries as defendant.

created position "Publications Quality Control Coordinator".

Although no specific date is given for the reappointment of Muscarella, construing things in the light most favorable to plaintiff, let us assume that the date of the reappointment of Muscarella was July 31, 1966, as this is the date also relied upon by the Equal Employment Opportunity Commission, hereinafter referred to as "EEOC." (See the Appendix to the brief of the United States and the EEOC.)

On September 14, 1966, plaintiff filed a charge of discrimination against the defendant with the EEOC. Nowhere is it alleged and nowhere is there any evidence that plaintiff ever filed a charge with the California Fair Employment Practices Commission.

On October 4, 1966, EEOC served the charge on defendant Litton Industries, and on March 30, 1967, the EEOC made its decision, as appears more specifically in the Appendix to the brief of the United States and the EEOC.

Thereafter on June 7, 1967, apparently attempting to comply with the provisions of *42 U.S.C. 2000 e-5 (e),* the EEOC informed the plaintiff that she was now free to commence her action within 30 days. On July 6, 1967, plaintiff filed her action in the United States District Court for the Central District of California.

On September 27, 1967, following a motion to dismiss timely made by defendant Litton Industries, the District Court dismissed plaintiff's complaint without leave to amend, on the ground that plaintiff's action was barred by the Statute of Limitations. This appeal followed.

ARGUMENT.

I.

Valid Conciliation Efforts by the Equal Employment Opportunities Commission Are a Jurisdictional Prerequisite to the Maintenance of a Civil Action Under Section 706 of the Civil Rights Act of 1964.

All parties to this action are in apparent agreement that valid conciliation efforts by the Equal Employment Opportunity Commission are a jurisdictional prerequisite to the maintenance of a civil action, pursuant to Section 706 of the Civil Rights Act of 1964 (*42 U.S.C. 2000e-5).*

Whatever may have been the former state of the law, recent decisions have made it manifestly clear that valid conciliation efforts by the EEOC must be conducted prior to the maintenance of any action against an allegedly discriminatory employer. (*Mondy v. Crown Zellerback Corp., et al.* (E.D., La., 1967), 271 F. Supp. 258; *Reese v. Atlantic Steel Co.* (D.C., N.E. Ga., 1967), Civil Case No. 10309; *Dent v. St. Louis-San Francisco Railway Co.* (N.D., Ala., 1967), 265 Fed. Supp. 56, affirmed in a *per curiam* opinion by the Fifth Circuit in the case of *Glover v. St. Louis-San Francisco Railway Co.* (C.A. 5, December 5, 1967), Civil Case No. 24288.)

II.

There Has Never Been a Valid Filing of a Charge With the Equal Employment Opportunity Commission in This Action.

A. The Equal Employment Opportunity Commission Was Prohibited by Statute From Accepting the Charge When It Was Originally Filed on September 14, 1966.

The "decision" of the Equal Employment Opportunity Commission, dated March 30, 1967, and appended as an exhibit to the brief of the United States and the EEOC, indicates a complete disregard or total ignorance by the EEOC of the provisions of *Title 42, U.S.C. Sec. 2000-e-5(b)*. That section specifically provides, in part:

> "In the case of an alleged unlawful employment practice occurring in a State . . . which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State... authority to grant or seek relief from such practice . . . *no charge may be filed* under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the state or local law, unless such proceedings have been earlier terminated. . . . If any requirement for the commencement of such proceedings is imposed by a state or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate state or local authority." (Emphasis added.)

It seems obvious from the language of the foregoing section that the Equal Employment Opportunity Commission was without any jurisdiction to accept any filing of the original charge until sixty days after proceedings had been commenced with the California Fair Employment Practices Commission. Since it nowhere alleged that any proceedings whatsoever were ever commenced with the California Fair Employment Practice Commission, the Federal Equal Employment Opportunity Commission never obtained jurisdiction to accept any filing of a charge of discrimination. For the EEOC to have obtained the requisite jurisdiction it would have been necessary to have informed the plaintiff that she must file a charge with the California Fair Employment Practices Commission as a jurisdictional prerequisite to filing a charge with the Federal Equal Employment Opportunity Commission, pursuant to the requirements of *42 U.S.C. 2000-e-5(b)*. The EEOC, however, did not see fit to inform the plaintiff of the necessity of such a step. As a result it never obtained jurisdiction, there was never a valid filing of any charge with it, and any proceedings taken by the EEOC must be deemed void and a nullity. Since the administrative prerequisites to the maintenance of this action have not been, and cannot now be met, the Court below was correct when it dismissed plaintiff's complaint without leave to amend.

B. Assuming for the Sake of Argument, That the Filing of the Original Charge With the Equal Employment Opportunity Commission on September 14, 1966 Was Valid (Which This Amicus Curiae Does Not for a Moment Believe) Then the EEOC Still Failed to Follow the Statutory Directives With the Result That Plaintiff's Action Was Properly Dismissed.

Title 42 U.S.C. Sec. 2000e-5(e) reads in part, as follows:

> "If within thirty days after a charge is filed with the Commission . . . (except that . . . such period may be extended to not more than sixty days upon the determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance . . ., the Commission shall so notify the person aggrieved and a civil action may, within 30 days thereafter be brought against the respondent named in the charge . . ."

It is respectfully submitted that the language of the foregoing section makes it manifestly clear that even assuming the filing of September 14, 1966 was valid, the EEOC had until November 13, 1966, at the very latest, to notify plaintiff of her right to bring a civil action, after which the plaintiff would have until December 13, 1966 to file her action. It would thereafter be barred by the Statute of Limitations set forth in the above section. The instant lawsuit was not commenced until July 6, 1967, almost six months after the date when plaintiff's suit was barred by the provisions of the statute. The action was therefore properly dismissed by the Court below on this additional ground, as well as that raised for the first time by this *amicus curiae*

in section A., *supra.* (*Cf. Evenson v. Northwest Airlines Inc.* (DC., Va., 1967) 268 Fed. Supp. 29).

Plaintiff, together with the United States and the EEOC, urged the position that the limiting provisions contained in 42 U.S.C. 2000e-5(e) are directory rather than mandatory. It is submitted that such a view is not correct, and to the extent that other cases have so held, they should be specifically disapproved by this Court.

As pointed out by the brief of the United States and the EEOC, the private litigant must afford the EEOC the chance to conciliate and obtain voluntary compliance. The statute places an obligation on the Commission to accomplish this with 30 days, or within 60 days if it extends the time. (*Brief of the United States and the Equal Employment Opportunity Commission,* pages 7 and 9.) We agree with that statement of the law, but feel it does not go quite far enough. Under 42 U.S.C. 2000e-5(b), the EEOC is required to give the appropriate state agency an opportunity to conduct proceedings *prior* to the time that the EEOC gets into the picture at all.

The Government urges the position that "to adopt the District Court's construction of the time limitations of Section 706 (e) would place a litigant in the anomalous position of being penalized for a delay for which the EEOC is solely responsible, and over which he has no control." We submit that such is not the case. Pursuant to the Act, most of the cases filed against employers seek (1) injunctive relief, and (2) damages. It is conceded that if the action in a case such as the one before this Court is barred by the Statute of Limitations, the plaintiff's right to an injunction is probably

permanently extinguished. Plaintiff's right to damages, however, remains alive, and although plaintiff's cause of action against the allegedly discriminatory employer is barred, a new cause of action against the United States and the EEOC arises as the result of the negligent failure of the EEOC to comply with the statutory directives. (See point V, *infra.*)

The Government argues that to construe the limiting periods as mandatory runs contrary to the intent of Congress. This is simply not the case. The Act could have been worded in a much different manner and it could very easily have been spelled out that the limiting periods were discretionary and not mandatory. Congress did not see fit to do this. Looking to the four corners of the statute itself it seems manifestly clear that Congress did, in fact, intend the statute to be binding. If, for example, the period were discretionary rather than mandatory, why did Congress bother to add the proviso, as found in *42 U.S.C. 2000-5(e):* ". . . except that in either case such a period may be extended to *not more than sixty days* upon a determination by the Commission that further efforts to secure voluntary compliance are warranted . . ."? Had Congress intended the periods to be discretionary it would have been a simple matter to leave the 30-day period in the Act and simply qualify it by appropriate language. Not only did Congress not qualify the 30-day period, it made a specific provision for an extension for an additional 30 days. What could possibly be more mandatory than the words "to not more than 60 days"? It stretches credulity to assume that the Congress of the United States would utilize language of that type if it in fact intended that the statutory limiting periods be discretionary rather than mandatory.

The views of the individual members of Congress only serve to emphasize the wide and varied feelings of those members concerning this Act. In *Hall v. Werthan Bag Corp.* (D.C., M.D. Tenn., 1966), 251 F. Supp. 184, at page 187, we find several remarks made by Senator Javits of New York, who is obviously a strong backer of the Act. The case of *Mondy v. Crown Zellerback Corp., supra,* at page 263, contains further language of members of Congress.

But other members of Congress have indicated quite a different view when considering the EEOC. According to U.S. Senator Paul Fannin of Arizona, in an article appearing in the March, 1968, issue of *Nations Business,* the record of the EEOC is one of "misuse of power, violation of the spirit and letter of the law, and disruption of the relationships among labor, management and unions." Senator Fannin also quotes Congressman Martha Griffiths of Michigan to the effect that the EEOC officials are, as he put it, "completely out of step with the President, the rest of the administration, the Courts and, indeed, the country as a whole." As an example, the Arizona Senator cites the case of a small midwestern manufacturer who ran afoul of the Commission because he had no job openings and thus declined to hire a negro job seeker who didn't even bother to fill out an application. Six months later, the Commission served a charge of discrimination on the company.

A field examiner for the Commissioner interviewed several employees of the company, trying to find other employees who might enter complaints, and had the incredible gall to admit disappointment when he couldn't develop any because, as he put it, "I like to find

people who aren't happy in their jobs." He admitted that he could discover no evidence of discrimination, yet despite that, the EEOC found the company guilty of an unfair employment practice.

The terms of the so-called "conciliation" and "settlement" stagger even the wildest of imaginations. The EEOC wanted to impose four conditions: First, that the manufacturer hire the negro who had asked about the job, and pay him back wages from the time of his alleged application. Second, that he employ, train, and accept the applications of the next 75 negroes referred to him by a civil rights organization, whether he had openings or not. Third, that he agree to hire negroes for the next five white collar jobs and promote at least three negroes to supervisory positions within three months. Fourth, that the manufacturer not promote any non-negro without the Commission's prior approval.

Commenting on the aforementioned case, one reporter put it: "This unbelievable example of a Government agency telling a private businessman who he must hire and promote may be more outrageous than the average EEOC dictate, but it certainly isn't unusual."[2] As Senator Fannin put it, most EEOC orders to employers call for reverse discrimination, an end to job seniority arrangements, and an end to job testing. In many cases obedience to EEOC demands would actually require an employer to violate the Taft-Hartley Act.

It therefore becomes obvious that the views of members of Congress on the EEOC are as varied as the winds. It also seems obvious that the limiting periods

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[2]Editorial of James Marine, Radio Station KPOL, Los Angeles, California, March 26, 1968, 8:00 a.m.

placed within the Act were put there as compromise measures, without which passage of the Act might well have been impossible.

III.

Since There Has Never Been a Valid Filing of a Charge of Discrimination With the EEOC, Any Action Purportedly Taken by the EEOC Is Void and a Nullity.

As pointed out in Point I, *supra,* valid conciliation efforts by the EEOC are a jurisdictional prerequisite to the maintenance of a civil suit under Section 706 of the Civil Rights Act of 1964. However, in certain jurisdictions, there are further jurisdictional prerequisites which must be met before the EEOC can even accept the filing of a charge or act thereon. This is the case in the State of California. Under *42 U.S.C. 2000e-5(b),* as pointed out *supra,* the EEOC may not accept the filing of a charge prior to the expiration of 60 days after proceedings have been commenced under the state or local anti-discrimination law. To obviate difficulties which could arise in some jurisdictions, the section further provides: ". . . the proceedings shall be deemed to have been commenced for the purposes of this section at the time such statement is sent by registered mail to the appropriate state or local authority."

The law is well settled that a Federal Court may judicially notice the existence of, and the statutes governing, state commissions, such as the California Fair Employment Practice Commission. (*Rule 33a; Owings v. Hull* (1935), 9 Pet. 607, 9 L. Ed. 246; *Gormley v. Bunyan* (1891), 138 U.S. 623, 11 S. Ct. 453, 34 L. Ed. 1068; *Mills v. Green* (1895), 159 U.S. 651, 16 S. Ct. 132, 40 L. Ed. 293; *Kansas City Western Railway Co.*

v. McAdow (1916), 240 U.S. 51, 36 S. Ct. 252, 60 L. Ed. 520.) In addition to the statutory and decisional authorities for the proposition that a Federal Court may properly judicially notice the existence of and the statutes governing the California Fair Employment Practice Commission, judicial notice may also be taken on the further grounds that the existence of, and the statutes governing the California Fair Employment Practice Commission are facts which are "widely and generally known." (*DeBary v. Arthur* (1876), 92 U.S. 420, 23 L. Ed. 936; *Carroll v. United States* (1925), 267 U.S. 132, 45 S. Ct. 380, 69 L. Ed. 543; *Mandelbaum v. Goodyear Tire and Rubber Co.* (C.C.A. 8, 1925), 6 F. 2d 818.) The foregoing was further strengthened by two recent cases which held that the statutes and administrative acts of the states in which Federal Courts are sitting may be judicially noticed, and state law need not be pleaded. (*Brown v. Graham* (D.C. Ore., 1959), 169 F. Supp. 397; *Beach v. Grollman* (E.D. Penn., 1959), 169 F. Supp. 612.)

This Court may properly take judicial note of the fact that California has a "state authority" within the meaning of 42 U.S.C. 2000e-5(b) and therefore the EEOC was powerless to receive any filing of any charge whatsoever until "60 days after proceedings have been commenced under the state . . . law." Since no proceedings have ever been commenced under the appropriate state law, the Equal Employment Opportunity Commission has never obtained the requisite jurisdiction over this matter, there has been no exhaustion of administrative remedies, and the Court below acted properly in dismissing the action without leave to amend.

IV.

Since There Has Never Been Any Valid Conciliation Effort by the EEOC, and Can Be None at This Late Date, the Court Below Was Correct in Dismissing Plaintiff's Complaint Without Leave to Amend.

As was discussed previously, no charge has ever been validly filed before the EEOC. Since no charge was ever validly filed, the EEOC never obtained jurisdiction and the action was properly dismissed. The question then arises, can a charge be filed with the EEOC at this late date? The answer is "No".

42 U.S.C. 2000e-5(a) is the broad, governing paragraph which covers the filing of charges before the EEOC. It is further limited by the provisions of paragraphs 5(c), 5(d), and 5(e) of the same section. Of primary importance here is section 5(d). This section provides:

> "A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) of this section, such charge shall be filed by the person aggrieved within 210 days after the alleged unlawful employment practice occurred, or within 30 days after receiving notice that the state or local agency has terminated the proceedings under the state or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the state or local agency."

Since well over a year and a half have gone by since the last act of alleged discrimination, any filing with the EEOC at this late date is barred, regardless of how the period is computed or what interpretation is placed upon the various statutory provisions. Whether we use the 90-day section or the 210-day section makes no difference, since both have long since elapsed. As pointed out in Point II B, even construing every possible fact in favor of the plaintiff, and assuming for argument sake that the original oiling of September 14, 1966 was valid, which it in fact was not, plaintiff's action is still barred by the failure of the EEOC to comply with the provisions of U.S.C. 2000e-5(e).

V.

Plaintiff Has Not Been Deprived of Her Remedy. Due to the Negligent Failure of the EEOC to Follow the Statutory Directives Imposed Upon It, Plaintiff's Action for Damages May Not Be Properly Maintained Against the United States and the EEOC.

At the outset, it must be conceded that plaintiff has, in all probability, lost her right to injunctive relief as the result of the running of the Statute of Limitations. Her right to seek damages from defendant Litton Industries is also barred by the Statute of Limitations, but simultaneously with the running of the Statute of Limitations, as the result of the negligent failure of the EEOC to discharge its statutory duties, plaintiff gained a new cause of action against the United States and the EEOC.

Pursuant to the provisions of 28 U.S.C. 1346(b), District Courts of the United States have original

jurisdiction, concurrently with the Court of Claims, of civil actions on claims against the United States, for money damages, for injury or loss of property caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. The position of the EEOC is very similar to the position occupied by a lawyer handling a case for his client. If the client has a good cause of action for some injury suffered by the client, and the lawyer negligently fails to file his client's action within the proper statutory period, the client's cause of action against the original defendant is barred by the Statute of Limitations, but a new cause of action immediately arises against the lawyer for professional malpractice, recovery for which is had on a negligence theory.

The EEOC stands in much the same position as the aforementioned lawyer. It has been consulted by an aggrieved party in order that it may satisfy the demands of the aggrieved party and hopefully solve whatever problem may exist. Just as the lawyer has from the date of his initial interview with his client until the running of the Statute of Limitations to settle his client's action or file a lawsuit, so the EEOC has from the date of the filing of the charge until 60 days thereafter to conciliate or settle the matter, or advise the aggrieved party to bring a civil action within 30 days. The failure of the EEOC to discharge its duties is exactly the same as the failure of a lawyer to file an action before the running of the Statute of Limitations.

28 U.S.C. 2674 makes it clear: "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . ." Further, it has been held that the United States may be liable under 28 U.S.C. Sec. 2674, and Sec. 1346(b), even though none of its employees is legally liable to the person injured. (*U.S. v. Hull* (C.A., Mass., 1952); 195 F. 2d 64.) Similarly, as the Court pointed out in *Ingham v. Eastern Airlines Inc.* (C.A. 2, 1967), 373 F. 2d 227, at page 236:

> "It is now well established that when the Government undertakes to perform services, which in the absence of specific legislation would not be required, it will, nevertheless, be liable if these activities are performed negligently. Thus, for example, though the Government may be under no obligation in the absence of statute to render medical care to discharged veterans, when it decides to provide such services and does so negligently, it has been held liable under the Tort Claims Act. *U.S. v. Brown*, 348 U.S. 110, 75 S. Ct. 141, 99 L. Ed. 139 (1954)."

In the instant case the Government undertook to investigate and attempte to conciliate the plaintiff's differences with defendant Litton Industries. It did so pursuant to a specific statutory scheme which established the EEOC. As the result of the negligent failure to follow the statutory directives, plaintiff's lawsuit against the defendant is now barred by statute. She therefore has a good cause of action against the Government. As that Court in the *Ingham* case, *supra,* so aptly pointed out:

> "Moreover, we can give little weight to the Government's claim that since its initial decision to provide weather information was a gratuitous one, it

> could prodeed with impunity to violate its own regulations and act in a negligent manner. Dean Prosser has put this doctrine to rest in his treatise: 'The Good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing.' Prosser, *Law of Torts,* 333 (3rd Ed. 1964)."

The Government will no doubt, as it did in the *Ingham* case, *supra,* fall back on the defense that even if it did breach a duty and even if that breach was the proximate cause of the injuries now suffered by plaintiff, the Government is exempted from liability by virture of the provisions of 28 U.S.C., Sec. 2680. That section provides, in part:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to:
>
> a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion be abused. . . ."

The Court in the *Ingham* case, *supra,* has laid any such defense to rest once and for all. As the Court said, at page 238:

> "The Government cannot, therefore, disclaim its liability on the ground that the omission occurred in the execution of a regulation, for, in fact, it failed to comply with the regulation by omitting to furnish necessary information."

Here, of course, the Government failed to comply with the regulations governing the EEOC by failing to notify the plaintiff of her right to bring a civil action within the time set forth in the statute. The language of the statute is clear when it says, in 42 U.S.C. 2000e-5(e): ". . . The Commission *shall* so notify the person aggrieved and a civil action may, within 30 days thereafter be brought . . ." (Emphasis added.)

VI.

Even Assuming That the Filing of the Charge With the EEOC on September 14, 1966 Was Valid, Plaintiff's Action Is Nevertheless Barred by the Statute of Limitations, Regardless of How the Statutory Period Is Computed, and the Court Below Was Correct in Its Ruling.

A. Assuming a Jurisdiction Without Anti-Discrimination Legislation Within the Meaning of 42 U.S.C. 2000e-5(b), the Action Is Still Barred.

Even assuming that the State of California does not have antidiscrimination legislation falling within the definition of 42 U.S.C. 2000e-5(b), which is not the case, plaintiff's action is still barred since it was not filed within the period prescribed by Section 706 of the Civil Rights Act of 1964. The Government in this case has argued vigorously "for to require that suit must be filed within 180 days after the alleged act of discrimination without regard to the status of the EEOC's effort would, as we see it, diminish the possibility of compliance through private informal conference and conciliation." (Brief of the U.S. and the EEOC, p. 11). Are we really supposed to assume that the various periods set forth throughout Section 706 of the Civil Rights Act of 1964 are meaningless?

Apparently the Government regards some sections to be mandatory, and other sections to be discretionary, but gives us no clue as to precisely how we are to separate one from the other. Following the Government's line of reasoning, the EEOC could theoretically take unlimited time in the handling of a case before notifying a prospective plaintiff of the right to bring a civil action, and the plaintiff would thereafter have 30 days—although we are in no way given a clue as to why the 30-day period is mandatory, whereas the 60-day period imposed on the EEOC is discretionary —in which to file a civil action. We respectfully submit that such an argument must fail in the light of reason and logic.

Consider the situation involving the private litigant who has suffered personal injuries. The litigant theoretically goes to an attorney after suffering the injuries, and discloses the facts of the particular case. The attorney then contacts the defendant and attempts to settle the matter in an amicable manner, without the necessity of filing a formal lawsuit. If, however, it becomes apparent that no settlement is possible, or that the Statute of Limitations, whatever it may be, is in danger of running, the attorney naturally files the action. Does this mean that at the instant of the filing of the action all further settlement measures are hopelessly blocked? We hardly think so. Just as further settlement efforts would not be barred in a case such as the example just given, neither are they barred or in any way hindered by the filing of the civil action after the EEOC has made its 60-day attempts at conciliation. It is even conceivable that attempts at settlement might be helped in some instances by the filing of a timely lawsuit!

The fact that the EEOC may have a "burdensome caseload" is in no way persuasive that the mandatory provisions of Section 706 of the Civil Rights Act of 1964 should be disregarded. To permit the EEOC to overlook or avoid its statutory responsibilities simply because it has a "burdensome caseload" flies in the face of reason. The regulation of the EEOC which purports to get around the established statutory scheme set up by Congress is obviously invalid, and violative of the very act which brought the Commission into being. Fortunately for us all, the EEOC does not have the power to enact legislation. To the extent that any of its regulations are contrary to the provisions of any statute duly enacted by Congress, those regulations are invalid, and may be disregarded in their entirety. Such is the case of the Commission's regulation as set forth on page 12 of the brief of the United States and the EEOC. However the EEOC might wish to overrule the Congressional directives contained within the Act, they are powerless to do so. We are unable to agree with the contention of the Government and the EEOC that "The regulation clearly evidences an intent to fulfill the statutory scheme . . ." (Brief of the United States and the EEOC, p. 12.) Rather, we think it clearly evidences a futile attempt to get around the mandatory provisions set forth by Congress in section 706 of the Civil Rights Act of 1964. It is particularly interesting to notice that 42 U.S.C. 2000e-5(e) uses the specific language: ". . . The Commission shall so notify the person aggrieved . . .", while the Commission's regulation states: ". . . The Commission shall *not* issue a notice . . ." (Emphasis added.) Is the Government really taking the position

Apparently the Government regards some sections to be mandatory, and other sections to be discretionary, but gives us no clue as to precisely how we are to separate one from the other. Following the Government's line of reasoning, the EEOC could theoretically take unlimited time in the handling of a case before notifying a prospective plaintiff of the right to bring a civil action, and the plaintiff would thereafter have 30 days—although we are in no way given a clue as to why the 30-day period is mandatory, whereas the 60-day period imposed on the EEOC is discretionary —in which to file a civil action. We respectfully submit that such an argument must fail in the light of reason and logic.

Consider the situation involving the private litigant who has suffered personal injuries. The litigant theoretically goes to an attorney after suffering the injuries, and discloses the facts of the particular case. The attorney then contacts the defendant and attempts to settle the matter in an amicable manner, without the necessity of filing a formal lawsuit. If, however, it becomes apparent that no settlement is possible, or that the Statute of Limitations, whatever it may be, is in danger of running, the attorney naturally files the action. Does this mean that at the instant of the filing of the action all further settlement measures are hopelessly blocked? We hardly think so. Just as further settlement efforts would not be barred in a case such as the example just given, neither are they barred or in any way hindered by the filing of the civil action after the EEOC has made its 60-day attempts at conciliation. It is even conceivable that attempts at settlement might be helped in some instances by the filing of a timely lawsuit!

The fact that the EEOC may have a "burdensome caseload" is in no way persuasive that the mandatory provisions of Section 706 of the Civil Rights Act of 1964 should be disregarded. To permit the EEOC to overlook or avoid its statutory responsibilities simply because it has a "burdensome caseload" flies in the face of reason. The regulation of the EEOC which purports to get around the established statutory scheme set up by Congress is obviously invalid, and violative of the very act which brought the Commission into being. Fortunately for us all, the EEOC does not have the power to enact legislation. To the extent that any of its regulations are contrary to the provisions of any statute duly enacted by Congress, those regulations are invalid, and may be disregarded in their entirety. Such is the case of the Commission's regulation as set forth on page 12 of the brief of the United States and the EEOC. However the EEOC might wish to overrule the Congressional directives contained within the Act, they are powerless to do so. We are unable to agree with the contention of the Government and the EEOC that "The regulation clearly evidences an intent to fulfill the statutory scheme . . ." (Brief of the United States and the EEOC, p. 12.) Rather, we think it clearly evidences a futile attempt to get around the mandatory provisions set forth by Congress in section 706 of the Civil Rights Act of 1964. It is particularly interesting to notice that 42 U.S.C. 2000e-5(e) uses the specific language: ". . . The Commission shall so notify the person aggrieved . . .", while the Commission's regulation states: ". . . The Commission shall *not* issue a notice . . ." (Emphasis added.) Is the Government really taking the position

that the EEOC by passing a simple regulation has the power or authority to overrule and nullify a specific act of Congress?

While we do not argue for one moment with the well established rule of law that administrative regulations promulgated pursuant to statutory authority have the force and effect statutes, (*Rodriguez v. Dunn* (D.C. Mich., 1955), 128 F. Supp. 604, affirmed 249 F. 2d 958; *Hertz Corp. v. The U.S.* (D.C. Del., 1958), 165 F. Supp. 261, reversed on other grounds 268 F. 2d 604, affirmed 80 S. Ct. 1420, 364 U.S. 122, 4 L. Ed. 2d 1603, rehearing denied 81 S. Ct. 31, 364 U.S. 854, 5 L. Ed. 2d 78), the law is clear and well settled that a Federal commission may not, by its regulations, alter or amend the law which Congress has enacted. (*Morrill v. Jones* (Me., 1882), 1 St. Ct. 432, 106 U. S. 466, 27 L. Ed. 267; *Bong v. Alfred S. Campbell Art Co.* (N.Y., 1909), 29 S. Ct. 628, 214 U.S. 236, 53 L. Ed. 979, 16 Ann. Cas. 1126; *Williamson v. U.S.* (Ore., 1908), 28 S. Ct. 163, 207 U.S. 425, 52 L. Ed. 278; *Campbell v. U.S.* (Ct. Cl., 1882), 2 S. Ct. 759, 107 U.S. 407, 27 L. Ed. 592; *Illinois Central Rwy. Co. v. U.S.* (1917), 52 Ct. Cl. 53; *Sherlock v. U.S.* (1908), 43 Ct. Cl. 161; *Symonds v. U.S.* (1886), 21 Ct. Cl. 148, affirmed 7 S. Ct. 411, 120 U.S. 46 30 L. Ed. 557; *Pederson v. Benson* (1958), 255 F. 2d 524, 103 U.S. App. D.C. 115; *United States v. Gredzens* (D.C. Minn., 1954), 125 F. Supp. 867.) To the extent that the regulation of the EEOC as set forth in 29 C.F.R. 1601.25a (Jan. 1, 1967) is inconsistent with Section 706 of the Civil Rights Act of 1964, it should be specifically overruled by this Court.

Conclusion.

From the foregoing it is respectfully submitted that the Court below acted properly and in accordance with the clear mandate of the law when it dismissed plaintiff's complaint without leave to amend. Federal agencies, such as the EEOC, will only be an effective force for good within these United States when they conduct their business in accordance with the statutory scheme established by Congress, and in compliance with the spirit and the letter of the law.

Respectfully submitted,

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Certification.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MITCHELL L. LATHROP